

JUL 30 1976

Nos. 75-1264 and 75-1276

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

**INTERNATIONAL UNION OF ELECTRICAL, RADIO AND  
MACHINE WORKERS, AFL-CIO LOCAL 790, PETITIONER**

v.

**ROBBINS & MYERS, INC.****DORTHA ALLEN GUY, PETITIONER**

v.

**ROBBINS & MYERS, INC.****ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT****BRIEF FOR THE UNITED STATES AS AMICUS CURIAE****ROBERT H. BORK,***Solicitor General,***J. STANLEY POTTINGER,***Assistant Attorney General,***FRANK H. EASTERBROOK,***Assistant to the Solicitor General,***WALTER W. BARNETT,****MARK L. GROSS,***Attorneys,**Department of Justice,**Washington, D.C. 20530.***ABNER W. SIBAL,***General Counsel,***JOSEPH T. EDDINE,***Associate General Counsel,***BEATRICE ROSENBERG,***Assistant General Counsel,***CHARLES P. HODGE,***Attorney,**Equal Employment Opportunity Commission,**Washington, D.C. 20506.*

## INDEX

	Page
Questions presented.....	1
Interest of the United States.....	2
Statement.....	2
Summary of argument.....	5
Argument.....	8
I. The charge filed with the EEOC was timely be- cause it was filed within 180 day of the discharge.....	9
A. Courts should give effect to the rule in force when the case is decided.....	9
B. The 1972 amendments and their legislative history demonstrates that Congress in- tended to apply the new rules to pending cases.....	12
C. The 180-day period applies to all previously filed claims that could have been filed in a timely manner after enactment of the 1972 amendments.....	15
II. The use of a contractual grievance resolution pro- cedure affects the time within which to file a com- plaint with the EEOC.....	17
A. An employee's discharge is not final until she has received the benefit of a contrac- tual right to its review.....	18
B. Use of contractual grievance procedures tolls the running of Title VII's statute of limitations.....	23
Conclusion.....	30

### CITATIONS

#### Cases:

<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36.....	4, 18, 27, 29
<i>American Pipe &amp; Construction Co. v. Utah</i> , 414 U.S. 538.....	10, 25
<i>Bradley v. School Board of the City of Richmond</i> , 416 U.S. 696.....	5, 9, 10, 11
<i>Buffalo Forge Co. v. United Steelworkers of America</i> , No. 75-339, decided July 6, 1976.....	28

(i)

## Cases—Continued

	Page
<i>Burnett v. New York Central R.R. Co.</i> , 380 U.S. 424	8,
	10, 24-25
<i>Chase Securities Corp. v. Donaldson</i> , 325 U.S. 304	10
<i>Culpepper v. Reynolds Metals Co.</i> , 421 F.2d 888	23, 24
<i>Dartt v. Shell Oil Co.</i> , C.A. 10, No. 75-1277, decided July 22, 1976	23
<i>Davis v. Valley Distributing Co.</i> , 522 F.2d 827, petition for a writ of certiorari pending, No. 75-836	12
<i>Egelston v. State University College at Geneseo</i> , C.A. 2, No. 76-7047, decided June 7, 1976	22
<i>Emporium Capwell Co. v. Western Addition Community Organization</i> , 420 U.S. 50	8, 28
<i>Gateway Coal Co. v. United Mine Workers of America</i> , 414 U.S. 368	28
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424	22
<i>Harrisburg, The</i> , 119 U.S. 199	25
<i>Johnson v. Railway Express Agency, Inc.</i> , 421 U.S. 454	4, 10, 18, 19
<i>Johnson v. University of Pittsburgh</i> , 359 F. Supp. 1002	22
<i>Jurinko v. Wiegand Co.</i> , 477 F.2d 1038	22
<i>Love v. Pullman Co.</i> , 404 U.S. 522	6, 16
<i>Malone v. North American Rockwell Corp.</i> , 457 F.2d 779	23
<i>Markham v. Cabell</i> , 326 U.S. 404	17
<i>Mathews v. Diaz</i> , No. 73-1046, decided June 1, 1976	11
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792	26
<i>Minnesota Mining &amp; Manufacturing Co. v. New Jersey Wood Finishing Co.</i> , 381 U.S. 311	28
<i>Moore v. Sunbeam Corp.</i> , 459 F.2d 811	22, 23
<i>Order of Railroad Telegraphers v. Railway Express Agency, Inc.</i> , 321 U.S. 342	25
<i>Phillips v. Columbia Gas of West Virginia, Inc.</i> , 347 F. Supp. 533, affirmed, 474 F.2d 1342	23
<i>Sanchez v. Trans World Airlines, Inc.</i> , 499 F.2d 1107	23
<i>Shapiro v. United States</i> , 335 U.S. 1	17
<i>United Steelworkers of America v. American Manufacturing Co.</i> , 363 U.S. 564	28
<i>United Steelworkers of America v. Enterprise Wheel &amp; Car Corp.</i> , 363 U.S. 593	28
<i>United Steelworkers of America v. Warrior &amp; Gulf Navigation Co.</i> , 363 U.S. 574	19, 28
<i>Usery v. Turner Elkhorn Mining Co.</i> , No. 74-1302, decided July 1, 1976	10
<i>Willingham v. Morgan</i> , 395 U.S. 402	11

## Statutes and regulation:

	Page
Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. (Supp. IV) 2000e <i>et seq.</i> :	
Section 706, 42 U.S.C. 2000e-5	13, 14, 18
Section 706(b), 42 U.S.C. 2000e-5(b)	16
Section 706(c), 42 U.S.C. (Supp. IV) 2000e-5(c)	16, 27
Section 706(d), 42 U.S.C. 2000e-5(d)	9
Section 706(e), 42 U.S.C. (Supp. IV) 2000e-5(e)	9, 12, 27
Section 706(f)(1), 42 U.S.C. (Supp. IV) 2000e-5(f)(1)	2
Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. IV) 2000e <i>et seq.</i> :	
Section 4	4, 5, 9
Section 14	5, 12, 13, 14
National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151 <i>et seq.</i>	2, 28
28 U.S.C. 1653	11
42 U.S.C. 1981	18, 19
29 C.F.R. 1601.9	29
Miscellaneous:	
117 Cong. Rec. 32111 (1971)	14
118 Cong. Rec. (1972):	
p. 4816	14
p. 4944	14
pp. 7166-7169	15
p. 7167	7-8, 15, 16, 26
p. 7169	15
p. 7170	15
pp. 7563-7567	15
p. 7564	16
p. 7565	7-8, 15, 26
p. 7567	15
pp. 7572-7573	15
H.R. 1746, 92d Cong., 1st Sess. § 4 (1971)	13, 14
H.R. 6228, 91st Cong., 1st Sess. § 2 (1969)	13
Meltzer, <i>Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination</i> , 39 U. Chi. L. Rev. 30 (1971)	24
S. 2453, 91st Cong., 1st Sess. § 10 (1969)	13
S. 2515, 92d Cong., 1st Sess. (1971)	14
§ 4	13
§ 14	14, 15
S. Conf. Rep. No. 92-661, 92d Cong., 2d Sess. (1972)	15, 16
S. Rep. No. 91-1137, 91st Cong., 2d Sess. (1970)	13
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)	14

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the 1972 amendments to Title VII of the Civil Rights Act of 1964, extending the time within which a charge of discrimination in employment may be filed with the Equal Employment Opportunity Commission (EEOC), apply to a charge

pending before the EEOC when the amendments became effective.

2. Whether the filing of a grievance pursuant to a collective bargaining agreement affects the time within which a charge must be filed with the EEOC.

#### INTEREST OF THE UNITED STATES

Although Title VII of the Civil Rights Act of 1964 creates private rights of action, both the Department of Justice and the EEOC also have important enforcement responsibilities. The enforcement authority of both agencies is activated by the timely filing of a complaint with the EEOC. 42 U.S.C. (Supp. IV) 2000e-5(f)(1). The issues presented by this case therefore will affect the conditions under which the federal government can respond to complaints concerning discrimination. Moreover, the Court's decision also may affect the utility of grievance procedures established by collective bargaining agreements. This in turn implicates the congressional decision, expressed in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.*, to encourage the establishment and use of peaceful grievance resolution procedures.

#### STATEMENT

Dortha Allen Guy is a former employee of Robbins & Myers, Inc. On October 25, 1971, during an absence from her employment, Robbins & Myers dismissed Guy (Pet. App. 3a).<sup>1</sup> Two days later a co-worker filed a grievance on Guy's behalf, acting pursuant to a pro-

<sup>1</sup> "Pet. App." refers to the appendices in No. 75-1264.

cedure established by a collective bargaining agreement between the Union<sup>2</sup> and her employer. The grievance stated: "Protest unfair action of Co. for discharge. Ask that she be reinstated with compensation for lost time" (App. 18a). This grievance was processed through the first three steps of the grievance procedures and was formally rejected by the employer on November 18, 1971 (App. 18a-19a; Pet. App. 3a).<sup>3</sup>

On February 10, 1972, 84 days after the employer's formal rejection of her grievance and 108 days after her dismissal, Guy filed a charge with the EEOC. Although the EEOC did not find reasonable cause to believe that Guy's discharge was racially motivated, it issued a notice on November 20, 1973, that she had a right to sue her employer. She brought a timely suit on March 19, 1974, alleging that her dismissal was racially motivated (App. 4a-9a).

On June 12, 1974, the district court dismissed Guy's suit for want of jurisdiction (Pet. App. 20a-24a). The court found that Guy had not filed her charge with the EEOC within 90 days of her discharge, and it held that Guy's resort to the contractual grievance resolution machinery did not extend the time in which

<sup>2</sup> The "Union" refers to the International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 790, petitioner in No. 75-1264.

<sup>3</sup> The collective bargaining agreement provides for four steps of grievance resolution procedures. The first three are conferences (1) between the employee and foreman; (2) between the chief steward and general foreman; (3) between union officers and senior representatives of management. The fourth step is arbitration (App. 35a-36a). Guy did not seek arbitration of her grievance (Pet. App. 3a).

to file the charge with the EEOC. The court of appeals affirmed (Pet. App. 1a-9a). It thought that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, taken together, indicated that the filing of a contractual grievance could not affect the time in which to complain to the EEOC because statutory remedies and remedies established by grievance procedures are independent. The court also stated that the 90-day period within which to file a charge was "more than a mere statute of limitations"; it was statutorily created as "an integral part of the right and \* \* \* must be strictly followed" (Pet. App. 5a).

The EEOC, participating on appeal as *amicus curiae* in support of Guy, pointed out that the Equal Employment Opportunity Act of 1972, 86 Stat. 105, extended to 180 days the time within which to file a charge. Because Guy's charge was filed 108 days after her dismissal and was pending on March 24, 1972, when the amendments became effective, the EEOC argued that it was timely. The court of appeals thought that it was not "required" to consider this point because it had not been made in the district court (Pet. App. 8a). It considered the argument nevertheless, concluding that Guy's charge was barred because more than 90 days had elapsed between Guy's discharge and March 24, 1972; it reasoned that the 1972 amendments could not "revive" a claim that was "barred and extinguished" prior to their effective date (Pet. App. 8a-9a). Judge Edwards dissented. He would have remanded the case to the district court for

consideration of the effect of the 1972 amendments (*id.* at 9a-12a).

#### SUMMARY OF ARGUMENT

##### I

Guy's claim with the EEOC was filed 108 days after her discharge and 84 days after upper management of her employer had decided not to reinstate her. Her claim was being processed by the EEOC on March 24, 1972, when the Equal Employment Opportunity Act of 1972, 86 Stat. 105, extended to 180 days the time within which to file a claim with the EEOC. Therefore, if the 1972 amendments apply to Guy's claim, it was timely.

We submit that the 1972 amendments apply. The ordinary principle is "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 711). The law in effect at the time the lower courts heard this case provided that a claim is timely if filed within 180 days. It is therefore this time limit, not the earlier 90-day limit, that applies to Guy's claim.

The statute and legislative history demonstrate that Congress intended the new time limitations to apply to previously filed claims. Section 14 of the 1972 amendments, 86 Stat. 113, provides that the amendments "shall be applicable with respect to charges pending

with the Commission on the date of enactment of this Act and all charges filed thereafter." Guy's charge was pending on March 24, 1972, the effective date of the amendments; it had been filed on February 10, 1972, and the EEOC was then processing it. The legislative history indicates that for purposes of Section 14 of the amendments a charge was "pending" before the EEOC if it had been filed prior to the effective date of the amendments. There was no intention that a charge must have been timely under the old 90-day limit as a condition of being "pending" for purposes of the amendments.

Moreover, Guy's claim was timely because it could have been filed after the effective date of the amendments. The one hundred eightieth day after her discharge was April 22, 1972, nearly a month after the amendments became effective. She could have filed a timely charge between March 24 and April 22. That being so, there is no purpose in penalizing her for filing the charge on February 10, which amounts to cutting off her claim under a statute of limitations because the claim was filed *too soon*. See *Love v. Pullman Co.*, 404 U.S. 522.

## II

Even if the 90-day time limitation applies to Guy's claim, it was timely filed because the 90 days did not begin to run until the contractual grievance resolution procedures had been completed.

A. A grievance filed under a collective bargaining agreement enables an employee to obtain contractual

review of the decision of her immediate supervisor to discharge her. A grievance is a method of obtaining the ruling of higher management on the question whether the employee's discharge was proper. Filing a grievance therefore should suspend the finality of the discharge for purposes of periods of limitations; the decision of the employer as an entity is not complete until the grievance process is complete. An employee claiming discrimination could file a claim at any time before or during the grievance process, because her injury commenced on the day of her discharge. But an employer's decision to discharge an employee is not a unitary act. It has a beginning and an end, and although the *right* to file a claim should arise at the beginning of that process, the *time* to file a claim should run from its completion.

B. The filing of a contractual grievance also should be viewed as an event that "tolls" the statutory time limitation. Statutes of limitations are directed at those who sleep on their rights, not at employees who promptly resort to thoroughly familiar rules of their shop, rules that their employer has implicitly promised will be effective to redress just complaints. The filing of a contractual grievance gives the employer notice of the complaint, allows it to gather evidence to support an eventual legal defense, and affords it an opportunity to reduce its exposure to back pay by reinstating the employee.

Allowing tolling in these circumstances would effectuate the congressional intention to "give the aggrieved person the maximum benefit of the law" (118

Cong. Rec. 7167, 7565 (1972)). It would promote the purposes of this "humane and remedial" Act, without any possibility of prejudice to the employer. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427. It would encourage cooperation and voluntary compliance, a primary goal of Congress, by supporting resort to private and informal remedies in the first instance. And tolling would also implement the desire of Congress to encourage peaceful resolution of labor disputes through collective bargaining and mutual grievance adjustment. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66. Premature resort to a Title VII claim may well undermine the effectiveness of the grievance mechanism. The two remedies can best be accommodated by allowing an employee a brief time to resort to her contractual rights without potential loss of her statutory rights.

#### ARGUMENT

Guy's right to an adjudication of the merits of her claim depends upon whether her charge, filed with the EEOC 108 days after her discharge and 84 days after her employer had rejected her contractual grievance, was timely.

The Equal Employment Opportunity Act of 1972 provides that an individual has 180 days to present her complaint to the EEOC. If the 1972 statute applies to Guy's complaint, then it was timely filed. Part I of this brief discusses the application of this statute. If the statute applies, as we argue, it does not matter whether the time for filing began to run upon Guy's

discharge or upon her employer's rejection of her grievance. Part II of this brief then argues that, in any event, the time to file a charge is affected by the filing of a contractual grievance.

#### I

THE CHARGE FILED WITH THE EEOC WAS TIMELY BECAUSE IT WAS FILED WITHIN 180 DAYS OF THE DISCHARGE

A. COURTS SHOULD GIVE EFFECT TO THE RULE IN FORCE WHEN THE CASE IS DECIDED

Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 104, amending Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. IV) 2000e-5(e), provides that a charge must be filed with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred \* \* \*." This 180-day time limit, effective March 24, 1972, replaced the 90-day time limit that had been contained in former Section 706(d), 42 U.S.C. 2000e-5(d). Guy's charge was filed with the EEOC 108 days after she was fired. If the 180-day limit applies, her charge was timely.

The ordinary "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 711), governs here. The law in effect at the time the district court and court of appeals rendered their decisions provided that a charge

filed within 180 days was timely. We know of no reason why the ordinary principle should not apply to statutes affecting timeliness. Cf. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314. If the courts should apply the law in effect at the time of their decision even when, as in *Bradley*, it creates entirely new substantive rights, it follows that they should apply the law in effect at the time of their decision when it simply extends the time within which to enforce substantive rights that already exist.<sup>4</sup> The employer's obligation not to discriminate long preceded the 1972 change, and it is not being penalized for conduct that previously was proper. "This is not a case where [the employer's] conduct would have been different if the present rule had been known" (*Chase Securities Corp.*, *supra*, 325 U.S. at 316). Cf. *Usery v. Turner Elkhorn Mining Co.*, No. 74-1302, decided July 1, 1976, slip op. 10-15, 20-22.

There are two exceptions to the general rule articulated by *Bradley*: the new rule does not apply where it would result in "manifest injustice" or where such

<sup>4</sup> The court of appeals concluded that the time limitations in Title VII are part of the substantive right itself, and hence are more than procedural statutes of limitations. This Court has rejected the drawing of such a substantive-procedural distinction when only federal statutes are involved. See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 556-557; *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 426-427. It has indicated that cases drawing such a distinction do so only for purposes of resolving conflicts of laws or deciding state law questions. *Burnett*, *supra*, 380 U.S. at 427 n. 2; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466-467. But if the court of appeals were correct, and the limitations in Title VII are matters of "substance," then the application of the *Bradley* principle would still be clear, for *Bradley* dealt with a "substantive" right to attorney's fees.

application would violate the intent of the legislature. There would be no "manifest injustice" in applying the new rule here; the employer has not alleged that it was prejudiced in any manner by the fact that the charge with the EEOC was filed 108 days rather than 90 days after Guy's discharge. Here, as in *Bradley*, the suit presents issues of "great national concern," involving the eradication of racial discrimination, and a meritorious claim, in addition to vindicating Guy's own rights, would advance the public's interest in obtaining equal employment opportunity (416 U.S. at 718-719 and n. 19). Moreover, as we show at pages 12-15, *infra*, the legislative history of the 1972 amendments, and the statutory language itself, indicate that Congress intended the new rules to apply to pending cases. The 180-day limitation consequently applies to Guy's charge.<sup>5</sup> See *Davis v. Valley Distributing Co.*, 522 F. 2d 827 (C.A. 9), petition for a writ of certiorari pending, No. 75-836.

<sup>5</sup> The court of appeals thought that it was not required to consider these arguments because they were not presented to the district court. This is incorrect. "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. 1653; emphasis added. This Court has indicated that an appellate court should treat the pleadings as if they had been properly amended, where a formal amendment would serve no useful purpose. See *Mathews v. Diaz*, No. 73-1046, decided June 1, 1976, slip op. 6-9; *Willingham v. Morgan*, 395 U.S. 402. Just as an appellate court should consider *sua sponte* whether the district court lacks jurisdiction, so too it should consider grounds upon which the district court possessed jurisdiction, whether or not those grounds were presented to the district court. In any event, the court of appeals did decide the question, and it is properly before this Court as one of the questions presented in both petitions for certiorari.

**B. THE 1972 AMENDMENTS AND THEIR LEGISLATIVE HISTORY DEMONSTRATE THAT CONGRESS INTENDED TO APPLY THE NEW RULES TO PENDING CASES**

Section 14 of the 1972 amendments to Title VII, 86 Stat. 113, provides:

The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

Guy's charge, which had been filed on February 10, 1972, was being processed by EEOC when the amendments became effective on March 24, 1972. Under Section 14 of the amendments, therefore, the new time limitation contained in Section 706(e) should be applied to her charge.

It could be otherwise only if a charge, untimely on the date it was filed, were not treated as "pending" by the courts, even though it was treated as "pending" by the EEOC. There is no support for such an interpretation. Section 14 applies to all of the 1970 amendments to Section 706, including the changes in the time limitations. If a charge that was out of time on the date it was filed were not "pending" on March 24, 1972, then the provision of Section 14 relating to "pending" charges would be surplusage as to the time limitations, for there could be no "pending" charges to which the extended time limitations of Section 706(e) could apply. In order to avoid depriving part of Section 14 of meaning, then, the Court should interpret that Section as applying to all charges

that were being processed by the EEOC on March 24, 1972, whether or not the charges were timely filed under the previous limitations.

This interpretation of Section 14 is supported by its legislative history. Some of the proposed bills to amend Title VII explicitly provided that the changes to Section 706 were *not* to apply to pending charges. For example, Section 10 of S. 2453, introduced in the first session of the 91st Congress (1969), stated:

Sections 706 and 710 of the Civil Rights Act of 1964, as amended by this Act, shall not be applicable to charges filed with the Commission prior to the effective date of this Act.

S. 2453, like several other legislative proposals,<sup>6</sup> would have amended Section 706 by granting the EEOC power to issue cease-and-desist orders after holding administrative hearings. Section 10 of S. 2453 was designed to prevent the EEOC from exercising the proposed cease-and-desist powers with respect to preexisting charges, but to apply the remainder of the changes in Section 706 to those charges.<sup>7</sup> The Committee Report recommending passage of S. 2453 so indicated. S. Rep. No. 91-1137, 91st Cong., 2d Sess. 31 (1970):<sup>8</sup>

<sup>6</sup> See S. 2515, 92d Cong., 1st Sess. § 4 (1971); H.R. 1746, 92d Cong., 1st Sess. § 4 (1971); H.R. 6228, 91st Cong., 1st Sess. § 2 (1969).

<sup>7</sup> S. 2453 included the same 180-day filing period as the bill ultimately enacted. S. Rep. No. 91-1137, 91st Cong., 2d Sess. 43 (1970).

<sup>8</sup> In the amended version reported out by the Committee, Section 10 was renumbered as Section 11.

This section provides that the amended provisions of section 706 concerning the cease and desist enforcement powers would not apply to charges filed with the Commission prior to the effective date of this act. The amended sections of section 706, particularly 706(a) through (e) and (q)(3) through (w) that concern procedural matters, attorney's fees and civil action remedies would apply to current charges.

The Committee Report on S. 2515, issued during the next Congress, included the same language, indicating that the Senate still desired to apply the new time limitations, but not the proposed cease-and-desist powers, to pre-existing charges. S. Rep. No. 92-415, 92d Cong., 1st Sess. 46 (1971).

The final legislation, however, did not contain cease-and-desist authority. Instead, it authorized the EEOC to bring civil actions in federal court. See S. 2515, 118 Cong. Rec. 4944 (1972); H.R. 1746, 117 Cong. Rec. 32111 (1971). Section 14 of S. 2515 as passed by the Senate provided that the amendments to Section 706 shall be applicable to all charges pending before the EEOC. This language complied with the Senate's previously expressed intent to apply all changes, except those concerning cease-and-desist powers, to previously filed charges. Because the bill finally passed contained no cease-and-desist powers, the new Section 14 was designed to apply to previously filed charges all the changes to Section 706. See also 118 Cong. Rec. 4816 (1972).

The Conference report also demonstrates that this is the proper construction of Section 14. It states

(S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 21 (1972)): "The Senate amendment provided that the new enforcement provisions of section 706 apply to charges pending before the Commission on enactment. The House bill was silent. The House receded." Congress therefore adopted the Senate's provision, and with it the Senate's understanding of its effects. The section-by-section analysis, considered and approved by both houses (118 Cong. Rec. 7166-7169, 7170, 7563-7567, 7572-7573 (1972)), stated that the extension of the limitations periods should be interpreted "so as to give the aggrieved person the maximum benefit of the law" (*id.* at 7167, 7565), and that Section 14 "would apply to charges *filed* with the Commission prior to the effective date of this Act" (*id.* at 7169, 7567; emphasis added). In light of this congressional preference, there can be little doubt that the 180-day period applies to Guy's claim.

C. THE 180-DAY PERIOD APPLIES TO ALL PREVIOUSLY FILED CLAIMS THAT COULD HAVE BEEN FILED IN A TIMELY MANNER AFTER ENACTMENT OF THE 1972 AMENDMENTS

The court of appeals suggested that Guy's claim was untimely because it was already barred when it was filed. We believe that this suggestion is completely and correctly answered by our argument above, that the claim was "pending" when the 1972 amendments became effective, and so is governed by the new time periods specified in those amendments. Even if that is not so, however, Guy's claim still is timely. She was fired on October 25, 1971. The one hundred eightieth day from her discharge was April

22, 1972. If she had not filed a claim when she did, but instead had filed her claim between March 24, 1972 (when the amendments became effective) and April 22, 1972 (when 180 days from her discharge expired), it undoubtedly would have been timely. Similarly, she could have filed a second claim between March 24 and April 22, which would have been timely. The court of appeals has effectively penalized Guy for filing her claim *too soon*, an ironic result for a case dealing with a statute of limitations.

The Court considered a similar trap for the unwary in *Love v. Pullman Co.*, 404 U.S. 522. Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), provided that a charge could not be filed with the EEOC until 60 days after it had been filed with a state or local agency, or until the termination of state or local proceedings, whichever came first.<sup>9</sup> The EEOC adopted the practice of accepting complaints and referring them to state or local agencies; it later would "file" the accepted charges at the appropriate time. This Court upheld the EEOC's procedures.<sup>10</sup> It concluded that to require the filing of a second charge with the EEOC "would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are

<sup>9</sup> This provision is now part of the amended Section 706(c), 42 U.S.C. (Supp. IV) 2000e-5(c).

<sup>10</sup> The Conference Committee's analysis of the 1972 amendments expressed Congress' agreement with *Love v. Pullman Co.* and the EEOC's practice. See S. Conf. Rep. No. 92-681, *supra*, at 17. See also 118 Cong. Rec. 7167 (Senate), 7564 (House) (1972). This approval, we submit, is an implicit congressional rejection of any duplicate filing requirement to preserve Title VII rights.

particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (404 U.S. at 526-527). A single filing with the EEOC was enough to give the notice contemplated by the statute, the Court held.

The same principle applies here. There is no reason to penalize Guy for having filed her complaint too soon. Nor is there any reason to require her, as a condition of receiving the benefits of the amendments, to have filed a second complaint between March 24 and April 22. The jurisdiction of the district court therefore should not turn on the absence of such a filing. Cf. *Shapiro v. United States*, 335 U.S. 1, 31; *Markham v. Cabell*, 326 U.S. 404, 409.

## II

### THE USE OF A CONTRACTUAL GRIEVANCE RESOLUTION PROCEDURE AFFECTS THE TIME WITHIN WHICH TO FILE A COMPLAINT WITH THE EEOC

Guy's complaint was filed with the EEOC 84 days after her employer's managing officials rejected the grievance filed under the collective bargaining agreement between her employer and the Union. If the time to file a complaint with the EEOC is calculated from that date, Guy's complaint was timely, whatever time limitation may be applied. We believe that three arguments support the conclusion that management's rejection of Guy's grievance is the proper date from which to calculate the time: first, a grievance under a collective bargaining agreement is a way of obtaining the

ruling of higher management upon the decisions of other officials of the employer, and the employee's right to obtain such a ruling suspends the "finality" of her discharge; second, the failure of management to rehire a black employee (for example), when a white employee would have been rehired, may itself be an act of racial discrimination; and third, the filing of a grievance may "toll" the period of limitations under Section 706(e). The first and second arguments are closely related and will be discussed together.

A. AN EMPLOYEE'S DISCHARGE IS NOT FINAL UNTIL SHE HAS RECEIVED THE BENEFIT OF A CONTRACTUAL RIGHT TO ITS REVIEW

An employee who is fired for racial reasons has a number of parallel and overlapping remedies available. The employee can bring an action under 42 U.S.C. 1981 (see *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460); the employee can file a claim of racial discrimination under Title VII; the employee can pursue remedies that may be created by her contract of employment and any collective bargaining agreement between her union and her employer. All of these remedies are available, and resort to one of them does not preclude resort to any other. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36. The court of appeals' analysis stopped at this point; it reasoned that because the remedies overlap, resort to any of them cannot affect the time within which to resort to another.

That is not necessarily so. Although invoking Title VII remedies does not affect the time within which to

file a Section 1981 suit (*Johnson, supra*), the effects of resorting to each remedy deserve separate analysis. The Court's decision in *Johnson* was influenced by a number of factors that do not apply to this case. In *Johnson* the Court was dealing with a state statute of limitations and state tolling rules; the statutes and timeliness rules here are entirely federal. In *Johnson* no underlying federal policy militated in favor of tolling; there is such an underlying policy here (see pages 27-28, *infra*). In *Johnson* the Court indicated that the filing of a Title VII claim, which was followed by extended administrative proceedings, was not sufficient to give the potential defendant in a Section 1981 suit notice of the potential claim for relief under the latter statute; that is not so here. The holding of *Johnson* therefore does not automatically apply to the instant case.

Perhaps the most fundamental difference between *Johnson* and this case, however, stems from the nature of a contractual grievance. A collective bargaining agreement is part of our system of "industrial self-government" (*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580). The rights and obligations established by such an agreement become the law of the shop, and they are an integral part of the rules that govern the employment relationship. Although the employer's foremen usually can fire an individual employee such as Guy, the question whether that discharge is proper depends in large measure upon the provisions of the collective bargaining agreement. The collective bargaining agreement

between the Union and Robbins & Myers provided that Robbins & Myers would discharge an employee only for "cause." It also provided that the employer would not discriminate on account of race or sex (App. 35a).

The grievance resolution procedures of a collective bargaining agreement also are part of the employment rights possessed by an employee. The employment relationship is not fully severed—that is, the employee is not without contractual rights against her employer—until the employee has taken advantage of such grievance resolution procedures as she and her bargaining representative may deem appropriate. In most collective bargaining agreements, of which the agreement involved in this case is an example, the initial steps of the grievance resolution procedures enable the employee and the union to obtain review by higher management of decisions made by the employee's immediate supervisor (see App. 35a-37a). The collective bargaining agreement involved in this case provided that a grievance shall be resolved in a meeting between the employee and her foreman within 24 hours of a grievance. If that answer was unsatisfactory, the employee had a right to receive a reply in writing within the next working day. The employee then had four working days to seek review by the general foreman and the line foreman. They were required to respond within 24 hours, and if their answer were unsatisfactory, the employee had an additional four working days to seek review by "representatives of management" (App. 36a). These representatives had 10 days to give written answers to the grievance.

At each step, higher representatives of the employer were called upon to review decisions by lower-ranking representatives of the employer. The final decision of the employer as an entity was made only after the third step of the grievance resolution process.

In a very real sense, therefore, Guy's discharge was not final until the "representatives of management" of Robbins & Myers had decided that they would support the decision of her foreman to fire her. Use of the grievance resolution process is not an "appeal" of a "final" decision, but is a method of obtaining the judgment of higher management on whether the employee should be retained. This does not mean that Guy was required to "exhaust" her contractual remedies. She suffered loss at the hands of her employer, and may have been a victim of discrimination, the moment she was fired. She therefore could have brought suit or filed a Title VII claim without further delay. But her resort to the contractual grievance resolution process suspended the finality of her separation from Robbins & Myers until higher management passed upon the decision of her foreman.<sup>11</sup>

Moreover, the processing of an employee's grievance can itself entail employment discrimination. Guy's complaint in the district court alleged (App. 7a) that at least one white employee of Robbins &

<sup>11</sup> In some respects the process resembles the filing of a petition for rehearing after a litigant loses a case in the court of appeals. The losing party may file a petition for certiorari immediately; instead, the losing party may file a petition for rehearing. The time to seek certiorari in this Court then does not begin to run until the court of appeals has passed upon the petition for rehearing.

Myers, fired under similar circumstances, had been reinstated during the grievance process. Because specific intent to discriminate is not a requirement under Title VII (*Griggs v. Duke Power Co.*, 401 U.S. 424), the act of higher management in not rectifying discrimination practiced by Guy's foreman would be a separate act of discrimination. Guy would have suffered twice: once when she was fired because of her race, and once when she was not reinstated. *Jurinko v. Wiegand Co.*, 477 F. 2d 1038 (C.A. 3); *Moore v. Sunbeam Corp.*, 459 F. 2d 811, 827 (C.A. 7). It would make little sense to require separate Title VII claims for each occurrence. It seems most appropriate, therefore, to treat the act of discrimination as a continuing one, commencing with the foreman's decision and continuing until upper management has endorsed that discharge.<sup>12</sup> The aggrieved employee could file a claim of discrimination at any time during this process, because the discrimination commenced with the foreman's decision. But for purposes of the time requirements of Title VII, the employee's time should run from the decision of higher management as well. In sum, our submission is that the decision of an employer to discharge an employee is not a unitary act. It has a beginning and an end, as different officials of management make decisions. The time to file a claim under Title VII should run from the end of the proc-

<sup>12</sup> Cf. *Egelston v. State University College at Geneseo*, C.A. 2, No. 76-7047, decided June 7, 1976 (time to file charge with EEOC does not begin to run until a professor's reinstatement is precluded by filling the post with another appointment); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa.).

ess, even though the right to file commences at the beginning.<sup>13</sup>

#### B. USE OF CONTRACTUAL GRIEVANCE PROCEDURES TOLLS THE RUNNING OF TITLE VII'S STATUTE OF LIMITATIONS

With the exception of the court in this case, every court of appeals that has considered the matter has held that the time to file a charge with the EEOC is tolled by resort to contractual grievance resolution machinery. *Culpepper v. Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5); *Malone v. North American Rockwell Corp.*, 457 F. 2d 779 (C.A. 9); *Moore v. Sunbeam Corp.*, 459 F. 2d 811 (C.A. 7); *Phillips v. Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 538 (S.D. W.Va.), affirmed, 474 F. 2d 1342 (C.A. 4); *Sanchez v. Trans World Airlines, Inc.*, 499 F. 2d 1107 (C.A. 10).<sup>14</sup> The commentators have endorsed this re-

<sup>13</sup> There is no reason to believe that this would result in substantial delay in filing claims or otherwise frustrate the intent of Congress. It is in the interest of management to process grievances with expedition, in order to minimize the exposure to a requirement that the employer pay for work not performed. Most collective bargaining agreements reinforce this incentive with explicit time requirements. The collective bargaining agreement here is no exception; it allowed 24 hours for the foreman's decision, four days to protest, 24 hours for the general foreman to decide, four more days to seek the judgment of higher management, and 10 days for them to decide. The grievance resolution process in this case took only 22 days. If the Union had elected to resort to arbitration, that choice would have had to be made in ten more days, and the collective bargaining agreement called for expeditious decision (App. 37a).

<sup>14</sup> See also *Dartt v. Shell Oil Co.*, C.A. 10, No. 75-1277, decided July 22, 1976, which holds that a complaint to the Department of Labor tolls the time to file a civil suit under the Age Discrimination in Employment Act, 29 U.S.C. 626(d)(1), which contains time limitations modeled on Title VII.

sult.<sup>15</sup> In our view, the *Culpepper* court persuasively articulated three arguments in support of a tolling effect. The court emphasized that statutes of limitations are directed at those who sleep on their rights and not at employees who are "thoroughly familiar with the rules of the shop" and elect to rely on them in the first instance (421 F. 2d at 891). It thought that the possibility of a restrictive reading of periods of limitation should be subordinated to the interests of justice and the purposes of a "humane and remedial Act" (id. at 892). And it concluded that tolling of the limitations period would encourage resort to the grievance process, a result that it believed was supported by the national labor policy. We discuss each point in turn.

When Congress creates both a substantive right and a period of limitations, it announces two conflicting principles. The substantive right indicates that Congress intended to eradicate racial discrimination in employment. The period of limitations indicates that Congress desired to induce employees to vindicate their rights expeditiously. But other federal policies, too, are involved, and this Court has often held that consideration of such additional policies may justify tolling a period of limitations. The controlling question "is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett v. New York Central R.R. Co.*,

<sup>15</sup> See, e.g., Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 48-50 (1971).

380 U.S. 424, 427. See also *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 555-556.<sup>16</sup>

The usual purpose of a period of limitations is to prevent an aggrieved party from sleeping on his rights, and to prevent unfairness to defendants that may be caused by the revival of stale claims. See *Burnett*, *supra*, 380 U.S. at 428; *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349; *American Pipe*, *supra*, 414 U.S. at 554-555. An additional consideration supports a requirement of prompt action upon Title VII claims. Because an employer may be liable for back pay for a racially-motivated discharge, prompt notice may enable the employer to reinstate the employee and so to reduce its liability. Neither purpose is frustrated by tolling the limitations period while contractual grievance resolution procedures are in use. Guy's grievance notified Robbins & Myers that she was protesting her discharge. The claim was not "stale" but instead was filed two days after the discharge, and the grievance was

<sup>16</sup> The court of appeals relied on the fact that the statute of limitations was part of Title VII itself, stating that it was therefore "an integral part of the right" (Pet. App. 5a) that must be "strictly followed" (*ibid.*). The court cited (Pet. App. 6a) *The Harrisburg* has been relied on, as here, to distinguish between statutes of limitations that are "substantive" and therefore immune from extension, and those which are merely "procedural." This Court now has held, however, that this distinction has no role to play outside the field of conflict of laws. See note 4, page 10, *supra*. "The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe*, *supra*, 414 U.S. at 557-558.

processed within 22 days. The resort to the grievance machinery gave Robbins & Myers ample opportunity to reinstate Guy and protect itself against substantial liability for back pay. Moreover, because the employer's decision rejecting the grievance relied upon a non-racial justification,<sup>17</sup> the grievance process gave the employer an opportunity to discover the evidence and explore the justifications for its action. This enabled it to prepare the central features of its defense in a Title VII action. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802. The grievance process therefore provided the employer with the "essential information necessary to determine both the subject matter and size of the prospective litigation" (*American Pipe, supra*, 414 U.S. at 555).

On the other hand, there is little reason to penalize an employee for resort to the familiar rules of the shop, rules that her employer has implicitly promised will be effective to redress just grievances. Title VII relies upon unassisted laymen to take the first steps in the presentation of claims of discrimination, and it was entirely natural for Guy first to turn to her contractual remedies. Congress has expressed an intention to "give the aggrieved person the maximum benefit of the law" (118 Cong. Rec. 7167, 7565 (1972)). This intention cannot be carried out unless the period of limitations is tolled by resort to contractual remedies. As in *Burnett, supra*, 380 U.S. at 427, tolling of the limitations period helps to effectuate the purposes

<sup>17</sup> Upper management justified the discharge on the basis of a violation of sick leave regulations (App. 18a-19a).

of a "humane and remedial" Act, without any possibility of prejudice to the employer.

Indeed, congressional policy would be well served by tolling in these circumstances. When enacting Title VII, Congress established "[c]ooperation and voluntary compliance \* \* \* as the preferred means" of eradicating employment discrimination. *Alexander v. Gardner-Denver Co., supra*, 415 U.S. at 44. Title VII implements part of this policy by giving state and local employment agencies, and the EEOC itself, an opportunity to settle individual cases "through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit" (*ibid.*).<sup>18</sup> Tolling Title VII's limitations periods during contractual

<sup>18</sup> Section 706(e), 42 U.S.C. (Supp. IV) 2000e-5(c), provides that a charge shall be filed initially with a state or local agency that handles discrimination cases, if there is one. This gives the State an opportunity to consider discrimination complaints arising within its jurisdiction and to seek to eliminate discrimination without federal intervention. EEOC cannot commence proceedings until the state or local agency has completed its proceedings, or until 60 days have passed after filing with the state or local agency, whichever comes first. An employee who files a claim with a state or local agency receives the benefit of an extended period of limitations. Section 706(e), 42 U.S.C. (Supp. IV) 2000e-5(e), provides that a claimant who has sought relief from a state or local agency can file a claim with the EEOC until 300 days after the alleged unlawful employment practice, or until 30 days after receiving notice of the termination of the state or local proceedings, whichever is earlier.

The extension of time created by resort to state or local agencies demonstrates that Congress does not insist upon strict observance of the 90 or 180-day limitations periods contained in Section 706(e). Just as resort to a state or local agency may obviate the need to file a charge with the EEOC, so resort to contractual grievance procedures may resolve a complaint short of federal inter-

grievance resolution also would contribute significantly to "[c]ooperation and voluntary compliance" without the need to invoke formal legal machinery, and without the need to resort to potentially wasteful duplicate remedies.

Another congressional policy, stated in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, is that the United States shall seek to ameliorate the detrimental economic effects of labor disputes by "encouraging the practice and procedure of collective bargaining." This congressional preference, the Court has held, includes a preference for peaceful resolution of disputes through grievance resolution and arbitration. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66; *Buffalo Forge Co. v. United Steelworkers of America*, No. 75-339, decided July 6, 1976, slip op. 14; *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368; *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra*; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593. "[A]rbitration is a substitute for industrial strife" (*Warrior & Gulf*, *supra*, 363 U.S. at 578), and the "federal policy favoring arbitration of labor disputes is firmly grounded in congressional command" (*Gateway Coal Co.*, *supra*, 414 U.S. at 377). The congressional policy

vention. This suggests that, if Congress had considered the problem, it would explicitly have provided that a contractual grievance tolls the time in which to file a charge with the EEOC. See *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320-322.

favours peaceful resolution of racial disputes no less than of others. *Emporium Capwell Co.*, *supra*.

*Alexander* recognized that although Title VII and grievance procedures are independent in the sense that resort to one does not bar resort to the other, they are also complementary. "[C]onsideration of the claim by both forums may promote the policies underlying each" (415 U.S. at 50-51). The intent of Congress in enacting Title VII was to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination" (*id.* at 48-49). Proper accommodation of the two procedures therefore requires a rule under which an employee will have a fair opportunity to utilize each remedy, and in which neither remedy will hinder resort to the other.

For many of the reasons discussed at pages 31-35 of the Union's brief, we submit that this accommodation of the two remedies is best accomplished by allowing an employee to resort first to contractual remedies, without suffering any diminution of ability to file a timely Title VII claim if these remedies are unavailing. The employee may wish to be in a position to compromise with her employer, which is more difficult once the Title VII process has begun. See 29 C.F.R. 1601.9. She may wish to encourage resolution of the dispute by promising not to pursue further remedies if her grievance is satisfactorily resolved. The employer may be more forthcoming if it believes that informal resolution is possible. And, as the Union points out (Br. 33), resolution of the dispute may be more likely if the employee is not required to accuse

her employer in public of "racism." These factors, and others, militate in favor of resort to contractual grievance machinery in the first instance. We submit that contractual grievance procedures and Title VII remedies can coexist, and each can be used to the full extent contemplated by Congress, only if initial resort to contractual remedies tolls the time to file a Title VII claim.

#### CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court with instructions to reinstate the complaint.

Respectfully submitted.

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JULY 1976.